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IN THE

Supreme Court of the United States

October Term—1948

No. 231

UNITED STATES OF AMERICA, *ex rel.* HAROLD E. HIRSHBERG,

Petitioner,

—v.—

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN J. O'NEIL,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Harold E. Hirshberg, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court entered on April 9, 1948, reversing an order of the United States District Court for the Eastern District of New York sustaining a writ of habeas corpus (R. 27, 228).

Statement of the Matter Involved

Petitioner enlisted in the United States Navy for the remaining period of his minority on March 24, 1936 (R. 38). Upon reaching his majority, he extended his enlistment on November 8, 1939, for a period of two years (R. 39). On November 7, 1941, while he was stationed at Cavite in the Philippine Islands, petitioner's enlistment again expired and he was honorably discharged from the Naval service (R. 45). On the same day he reenlisted for a further period of four years (R. 46, 124). He was promoted from time to time and on February 23, 1942, attained his present rating of Chief Signalman (R. 124).

In May, 1942, upon the surrender of Corregidor, petitioner became a prisoner of war of the Japanese and remained such a prisoner until he was liberated in September, 1945 (R. 124). After extensive hospitalization he was restored to duty (R. 40). On March 26, 1946, petitioner received an honorable discharge by reason of the expiration of his enlistment (R. 126). This discharge became effective at midnight, March 26, 1946, and at that time petitioner became a civilian (R. 41, 145). During the afternoon of the following day, March 27, 1946, petitioner again enlisted in the Navy for a period of four years (R. 42, 110).

On February 24, 1947, petitioner was served with charges and specifications, dated February 12, 1947, directing his trial before a General Court Martial convened by the Commandant, Third Naval District (R. 63, 134). There were three charges: Maltreatment of a Person Subject to his Orders, with four specifications thereunder; Conduct to the Prejudice of Good Order and Discipline, with four specifications thereunder; and Assaulting Another Person

in the Navy, with one specification thereunder (R. 134-141). The offenses set forth in the specifications were alleged to have been committed during the period from November 10, 1942, to March 1, 1944, during petitioner's prior enlistment and while he was a prisoner of the Japanese (R. 134-141).

At the outset of the trial petitioner made a plea in bar of trial on the following grounds: (1) that the General Court Martial had no jurisdiction to try him for offenses allegedly committed while he was a prisoner of war; and (2) that the General Court Martial had no jurisdiction to try him for offenses allegedly committed during an enlistment which had expired and at the termination of which he had received an honorable discharge. This plea was denied (R. 103, 105). On August 12, 1947, after trial, petitioner was acquitted of two charges and seven specifications. He was convicted of the charge of Maltreatment of a Person Subject to his Orders, under Article 8 (Second) of the Articles for the Government of the Navy (herein called "AGN"), and of two specifications thereunder.[1] He was sentenced to imprisonment for ten months, reduction in rating to apprentice seaman, and a dishonorable discharge from the United States Navy (R. 101).

On August 18, 1947, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York (R. 7-12). The petition challenged the jurisdiction of the Naval Court Martial on two grounds: (1) that at the time of the alleged offenses petitioner was not subject to the AGN since he was a prisoner of war of the Japanese; and (2) that upon the

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1 Each specification of which petitioner was convicted set forth a simple assault, *i.e.* with closed fists, of a fellow prisoner subject to petitioner's orders.

expiration of petitioner's enlistment during which the alleged offenses occurred and his receipt of an honorable discharge, the jurisdiction of the Navy to try petitioner for any offenses during that enlistment (except offenses under Article 14, AGN) was terminated, and his subsequent reenlistment did not revive that jurisdiction (R. 7-12). After argument the District Court filed its opinion on September 26, 1947, overruling the first contention of petitioner but sustaining the second (R. 200-212). On September 29, 1947, petitioner was released from the custody of respondent (R. 27-29).

Respondent appealed to the Circuit Court of Appeals for the Second Circuit from the order of the District Court by Notice of Appeal dated December 23, 1947 (R. 3, 4). Petitioner moved to dismiss the appeal, under Rule 73 of the Federal Rules of Civil Procedure, on the ground that it had not been taken within sixty days of the order of the District Court (R. 220-221). This motion was denied by the Circuit Court of Appeals on January 12, 1948 (R. 222).

The cause was argued before the Circuit Court of Appeals on March 4, 1948 (R. 223). On April 9, 1948, the Circuit Court of Appeals reversed the order of the District Court with a written opinion (R. 223-228). Circuit Judge Frank filed a dissenting opinion (R. 227). A petition for rehearing was filed by petitioner on April 20, 1948 (R. 229-241). Respondent filed a memorandum in answer to this petition on May 7, 1948 (R. 242-253). The cause was again argued before the Circuit Court of Appeals on May 13, 1948. On June 2, 1948, the Circuit Court of Appeals adhered to its former judgment, in a written opinion, by a divided court (R. 254-256, 264). Circuit Judge Frank again filed a dissenting opinion and withdrew his former dissenting opinion for reasons stated below (R. 256-264).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. sec. 347).

Statutes and Other Material Involved

1. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 8 (Second).

> "**Article 8. Persons to whom applicable.** Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—
>
> * * * * *
>
> **Second (Cruelty).** Or [who] is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders; * * *"

2. (Articles for the Government of the Navy) 34 U. S. C. §1200, Article 14 (Eleventh).

> "**Eleventh (Trial of offender after discharge).** And if any person, being guilty of any of the offenses[2] described in this article, while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

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2 The offenses described in Article 14 are frauds against the United States and similar crimes. They do not include the alleged offenses of which petitioner was convicted (R. 225).

3. 34 U. S. C. §591.

"**Regulations of Navy; what constitute.** The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner."

4. Naval Courts and Boards (1937 ed.) §334.

"**Same: When jurisdiction over persons terminates.** The jurisdiction of courts martial over officers, midshipmen, nurses, and enlisted men ordinarily ends when they become regularly separated from the service by acceptance of resignation or discharge. However, a discharge obtained by fraud does not oust the jurisdiction of a court martial. The mere expiration of the period of enlistment of an enlisted man, without the concurrence of any other circumstance whatsoever, does not operate to dissolve his status and does not of itself relieve him of liability to military law for offenses committed during the period of enlistment. Discharge by expiration of enlistment does not take effect, notwithstanding delivery of the discharge certificate, until midnight of the last day of service. Discharge at any other time or for any other cause takes effect on delivery of the certificate. An officer dropped from the rolls by order of the President for absence without leave for three months or more, in accordance with the act of April 2, 1918, cannot thereafter be tried by court martial, he having by this act become fully separated from the service and become a civilian.

The general rule is subject to the following exceptions:

(a) If any person, being guilty of any of the offenses of fraud, embezzlement, etc., against the United States, while in the naval service of the United States; receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. Except for offenses provided for in article 14, A. G. N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

* * * * *

5. Naval Courts and Boards (1923 ed.), §559, ft. nt. (30) [Change No. 7].

"Art. 14, A. G. N. (sec. 92).

Except for offenses provided for in that article, a court-martial may not try an individual who has been formally

separated from the Navy and is no longer in the service (31 Op. Atty. Gen. 521; *Ex parte Wilson,* 33 Fed. (2d) 214) unless proceedings were instituted against him while he was in the service (31 Op. Atty. Gen. 521; C. M. O. 26-1917). However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute (*Ex parte Joly,* 290 Fed. Rep. 858). Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Art. 14, A. G. N. (G. C. M. Rec. No. 75140, Feb. 1, 1933, and G. C. M. Rec. No. 76425, Apr. 4, 1934)."

Questions Presented

1. Whether petitioner's reenlistment in the Navy subjected him to the jurisdiction of the Navy to try him by court martial for an alleged offense committed during a prior enlistment, at the termination of which he had received a discharge, when, in the absence of such reenlistment, the Navy would admittedly not have had jurisdiction to try petitioner for such alleged offense (R. 41, 126, 224, 225).

2. Whether the Naval court martial had jurisdiction to try petitioner for an alleged offense committed during an enlistment which had expired, at the termination of which petitioner had received an honorable discharge (R. 100-109, 126, 134-141).

Reasons Relied On for Allowance of Writ

1. The Circuit Court of Appeals for the Second Circuit has decided a novel question of great importance in the administration of the AGN, in holding that reenlistment in the Navy revives the jurisdiction of the Navy to try an enlisted man for offenses committed during a prior enlistment. This question has not been, but should be, settled by this Court.

2. In its decision with respect to the effect of reenlistment, the Circuit Court of Appeals has adopted a strained construction of the AGN, which results in different rules for the Army and the Navy in the identical situation.

3. The holding of the Circuit Court of Appeals that petitioner consented to the jurisdiction of the Naval court martial by his contract of reenlistment is unrealistic and is inconsistent with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (CCA 8th, 1929).

4. In holding that the last two sentences of section 334(a), Naval Courts and Boards (1937 ed.) constituted a binding regulation concerning the effect of reenlistment, the Circuit Court of Appeals failed properly to interpret these two sentences as a mere reference to prior decisions.

5. In its decision with respect to the effect of reenlistment, the Circuit Court of Appeals has adopted a recent administrative interpretation of the AGN which has not been clearly established, and has rejected a prior long settled and contrary administrative interpretation.

6. The Circuit Court of Appeals has rendered a decision with respect to the legal effects of an honorable discharge from the Naval service which is of vital importance to the discipline and morale of Naval personnel, and which may affect the liberty and well-being of a great number of such personnel, and which should be settled by this Court.

7. The Circuit Court of Appeals has rendered a decision with respect to the legal effects of an honorable discharge which is inconsistent with the decisions of this Court and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Gould* v. *Drainer*, 158 F. 2d 981 (CCA 9th, 1947).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD E. HIRSHBERG,
Petitioner.

JOHN J. O'NEIL,
HAROLD ROSENWALD,
Attorneys for Petitioner.

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CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court is reported in 73 F. Supp. 990 (1947) (R. 200-212). The opinions of the Circuit Court of Appeals for the Second Circuit are not yet reported (R. 223-227, 254-264).

Jurisdiction

The basis for this Court's jurisdiction is set forth in the petition, *supra*, page 5.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that petitioner's reenlistment in the Navy revived the Navy's

jurisdiction to try him for an alleged offense committed during a prior enlistment.

2. The Circuit Court of Appeals erred in holding that the last two sentences of Section 334(a), Naval Courts and Boards (1937 ed.) constituted "instructions" and, accordingly, "regulations" within the meaning of Section 591 of Title 34, USC.

3. The Circuit Court of Appeals erred in holding that petitioner agreed under his contract of enlistment to be bound by the provisions of the last two sentences of Section 334(a), Naval Courts and Boards (1937 ed.).

4. The Circuit Court of Appeals erred in accepting a recent administrative interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy revives the jurisdiction of the Navy over offenses committed during a prior enlistment.

5. The Circuit Court of Appeals erred in failing to accept a long settled interpretation of the Articles for the Government of the Navy to the effect that reenlistment in the Navy does not revive the jurisdiction of the Navy over offenses committed during a prior enlistment.

6. The Circuit Court of Appeals erred in holding that petitioner's honorable discharge from the Naval service at the expiration of his prior enlistment did not extinguish his responsibility before a Naval court martial for any offenses allegedly committed during that enlistment.

Summary of Argument

In holding that petitioner's reenlistment revived the Navy's jurisdiction to try him for an alleged offense committed during a prior enlistment, the Circuit Court of Appeals has decided a question of general importance in the administration of Naval justice. The decision of that question may affect thousands of persons who may reenlist or be drafted into the Navy. The law concerning this question and related questions is in a state of confusion and should be clarified by this Court.

The decision of the Circuit Court of Appeals results in different rules for the Army and the Navy in the situation of this case, although there is no statutory basis for such a difference. Equal justice and the morale of the services require uniform interpretations of doubtful questions affecting the jurisdiction of courts-martial of the Army and the Navy.

The Circuit Court of Appeals has erred in interpreting the statements in Section 334(a) of Naval Courts and Boards (1937 ed.) as "regulations" binding upon petitioner under Section 591 of Title 34, U. S. Code. Moreover, the holding that petitioner agreed to be bound by these so-called "regulations" by his contract of reenlistment is based on an unsound construction of that contract. Petitioner cannot agree to be bound by the contents of a manual for Naval courts-martial which could never come to his attention.

The current administrative interpretation of the AGN concerning the effect of reenlistment on the jurisdiction of the Navy over offenses during a prior enlistment should not have been accepted by the Circuit Court of Appeals. That interpretation has not been clearly established and

is not consistent with related administrative rulings of the Navy. Moreover, it purported to replace an established administrative interpretation of the Navy which had become a part of the AGN.

Finally, the Circuit Court of Appeals has failed to accord any effect to the honorable character of petitioner's discharge at the expiration of his enlistment. In this respect the decision of the Circuit Court of Appeals is inconsistent with decisions of this Court and of another Circuit Court of Appeals.

ARGUMENT

I

The Circuit Court of Appeals for the Second Circuit has decided a question of general importance relating to the effect of reenlistment on the jurisdiction of the Navy over offenses committed during a prior enlistment.

A. *Importance of Question.*

The effect of reenlistment on the power of the Navy to punish for offenses committed during a prior enlistment has never been considered by this Court nor, prior to this case, by any Federal court. The importance of this question cannot be overstated. Naval courts martial are courts of limited jurisdiction, defined by Congress in the AGN. *Rosborough* v. *Rossell*, 150 F. 2d 809 (CCA 1st, 1945). In an area where that jurisdiction is doubtful, the Courts have the great responsibility of determining the precise limits of the jurisdiction. In a democratic society the scope of the authority of military tribunals involves

fundamental civil liberties. The extension of that authority is *pari passu* an encroachment on the jurisdiction of civilian courts having all the safeguards of the common law.

Although this case presents a novel question for this Court, the situation is not new or unusual. The Judge Advocate General of the Navy has published at least five opinions on the effect of reenlistment on Naval jurisdiction over offenses during a prior enlistment. C. M. O. 22—1917, page 7; C. M. O. 12—1921, page 11; C. M. O. 1—1926, page 9; C. M. O. 12—1929, page 7; C. M. O. 7—1938, page 42. See also: Winthrop, Military Law and Precedents (1920 ed.), page 93; 31 Op. Att'y Gen. 521 (1919). Since opinions are published in only a small fraction of Naval court martial cases, it may be assumed that the question has arisen in many other cases.[3] At present this Nation maintains and undoubtedly will continue to maintain large Naval forces. For the future the decision of this question will be of the gravest importance to thousands of enlisted men in the Navy. This Court has recognized the importance of determining the limits of the jurisdiction of Naval courts martial by granting a writ of certiorari in a recent case involving the jurisdiction to try members of the Fleet Reserve for offenses committed while not on active duty. *United States ex rel. Pasela* v. *Fenno*, 167 F. (2d) 593 (C. C. A. 2d, 1948), *certiorari* granted, June 21, 1948.

B. *Confused State of the Law.*

The confusion which exists concerning the jurisdictional question is shown by the instant case. In the District

3 Several unpublished decisions are referred to in Naval Courts and Boards (1923 ed.), Section 559 (ft. nt. 30) (added after original publication), and in C. M. O. 7—1938, page 42.

Court the writ of habeas corpus was sustained. In its first opinion the Circuit Court of Appeals reversed the District Court in reliance on the provisions of 34 U. S. C., Section 591, and Section 334(a), Naval Courts and Boards (1937 ed.), relating to the effect of reenlistment. A dissenting opinion was written by one member of the court (R. 256). The Circuit Court of Appeals later granted a petition for rehearing and ordered a reargument of the cause. In the oral argument on rehearing counsel for respondent conceded that the original majority opinion was unsound insofar as it was based on 34 U. S. C., Section 591 (R. 256). Despite this virtual confession of error with respect to an important ground for its decision, the majority, in a new *per curiam* opinion, adhered to its original decision and reaffirmed the grounds therefor. The dissenting judge, because of respondent's concessions in the oral argument, withdrew his original opinion and filed a new dissenting opinion (R. 256).

The Navy's administrative rulings concerning the effect of reenlistment are not consistent. From 1862 until 1933, (a period of 61 years) the Navy had held that reenlistment did not revive the jurisdiction over offenses committed during a prior enlistment (R. 257). C. M. O. 22—1917, page 7; C. M. O. 12—1921, page 11; C. M. O. 1—1926, page 9; C. M. O. 12—1929, page 7; Laws Relating to the Navy, Ann. (1929 Supp.), page 179. In 1933[4] or thereabouts the Navy mistakenly adopted a "precisely opposite interpretation" (R. 255) with respect to the specific situation involved in this case. As we shall show, this interpretation appears to be in conflict with other rulings of the Navy and of the Federal courts. (*Infra*, pages 24, 25). The rule

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4 See page 24, *infra*.

of the Army, based on no statutory provision, is contrary to the Navy rule and to the decision of the court below. Manual for Courts-Martial U. S. Army (1928), Par. 10; Dig. Op. JAG (1867-1912), page 515, §VIII 1 lb; Dig. Op. JAG (1912-1940), §369(4).

II

The Circuit Court of Appeals has adopted a strained construction of the Articles for the Government of the Navy which results in different rules for the Army and the Navy in the identical situation.

A. *Lapse of Jurisdiction upon Discharge.*

Generally a discharge or dismissal of an officer or enlisted man from the Naval service terminates the jurisdiction of the Navy with respect to all offenses except those under Article 14, AGN. *United States* v. *Warden*, 265 Fed. 787 (E. D. N. Y., 1919); *United States* v. *MacDonald*, 265 Fed. 695 (E. D. N. Y., 1920); *Ex parte Wilson*, 33 F. 2d 214 (E. D. Va., 1929); *Ex parte Drainer*, 65 F. Supp. 410, 411 (N. D. Cal., 1946), aff'd *sub nomine Gould* v. *Drainer*, 158 F. 2d 981 (CCA 9th, 1947); 5 Op. Att'y Gen. 55, 58, 59 (1848); 8 Op. Att'y Gen. 328 (1857); 24 Op. Att'y Gen. 570 (1903); 31 Op. Att'y Gen. 521 (1919); C. M. O. 1—1921, page 15. The same general rule, with a similar exception, prevails in the Army. See *Hironimus* v. *Durant*, 168 F. 2d 288 (CCA 4th, 1948). The Circuit Court of Appeals concedes this principle but creates confusion by confining its statement of the principle to cases of honorable discharge (R. 225). The jurisdiction is lost, under the AGN, by reason of separation from the service, even without honor. *Ex parte Wilson*, *supra*. Winthrop, Mili-

tary Law and Precedents (1920 ed.), page 93. Under Article 14 (Eleventh) of the AGN, the jurisdiction is expressly retained, after discharge or dismissal, with respect to certain offenses chiefly involving frauds against the United States. It seems clear from this express retention of jurisdiction in Article 14 that Congress intended the jurisdiction to lapse at the expiration of an enlistment in cases not arising under Article 14, such as the present case. Since the AGN contain no provision for jurisdiction over reenlisted men with respect to offenses during a prior enlistment, it may similarly be argued that Congress intended to exclude such jurisdiction.

B. *Conflict Between Army and Navy Rules.*

The AGN are silent concerning the effect of reenlistment and rightly so for each enlistment is a separate and distinct contract. *In re Grimley*, 137 U. S. 147 (1880). Until 1933, as we have stated above, the rule had long been established in the Navy that reenlistment did not revive jurisdiction over offenses committed during a prior enlistment. The same rule has long prevailed and still prevails in the Army (See pages 16, 17, *supra*). In Section 559 (ft. nt. 30) (added after original publication) of the 1923 edition of Naval Courts and Boards and in Section 334(a) of the 1937 edition of Naval Courts and Boards a change in the rule was indicated. This change was caused[5] by a decision of a Federal district court, which held that an Army court martial could try a regular Army officer for an offense committed during his earlier service as a Reserve officer, even though there had been an interval of

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5 *Ex parte Joly* was cited in C. M. O. 7—1938, page 42 and in Naval Courts and Boards (1923 ed.) Section 559 (ft. nt. 30), both of which indicated the change in the Navy's rule.

several months between his two services. *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y., 1922). This decision was plainly erroneous on the theory of the Circuit Court of Appeals in this case, since the District Court in *Ex parte Joly* failed to accept the administrative interpretation of the Army which had been in effect for many years. See pages 16, 17, *supra*. But the Circuit Court of Appeals now feels constrained to give the effect of law to the new interpretation of the Navy based on a Federal district court decision which failed to give such effect to the established rule of the Army. It is a strange commentary on the judicial process that the administrative ruling of the Army remains unchanged, both by *Ex parte Joly*, *supra*, and the decision below.

C. *Policy in Favor of Uniform Army and Navy Rules.*

Counsel for respondent has conceded that in the Army reenlistment does not revive jurisdiction over offenses during a prior enlistment (R. 257); Manual for Courts-Martial U. S. Army (1928), page 8 §10. In its construction of the AGN the Circuit Court of Appeals has imputed to Congress an intention to adopt differing rules for the Army and the Navy. In its construction of Naval Courts and Boards that Court has imputed a similar intention to the President.

The recent merger of the armed forces indicates an intention to treat all the services alike. It is not conceivable that Congress would have intended, in the identical situation, to subject Naval personnel to trial by court martial and to let Army personnel go free. Strong reasons should exist for finding such a discrepancy. They are not stated in the majority opinions of the court below. Surely this

Court should say the last word where such a result is reached by a divided court on doubtful grounds.

D. *The Construction of the AGN by the Court Below is Erroneous.*

In construing the AGN, the court below has ignored the established principle that penal laws "should not receive a strained construction in order to sustain the jurisdiction of a special and limited tribunal such as a court martial". *Rosborough* v. *Rossell, supra,* 150 F. 2d at page 816. The construction adopted by the court below is strained beyond the breaking point. Conceding that the last two sentences of Section 334(a), Naval Courts and Boards, are "not in form an imperative declaration," the court held that they nevertheless constituted an "instruction" and therefore a "regulation".[6] Accordingly, said the court, they were binding on petitioner under Section 591, Title 34 U. S. C.[7] It is submitted that this reasoning is wholly unsound. Moreover, it ignores the axiom of military law that

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6 The majority opinion of the court below states that Section 334(a) must be an "instruction" "for otherwise it would be meaningless to include it in a volume issued for the government of all persons attached to the naval service' * * *." (R. 226). But there are numerous statements in Naval Courts and Boards which could not conceivably be "instructions" much less "regulations". Take, for example, the following statement from Section 333: "The status of civilians on duty with or attached to the Naval forces of the United States and entering the war zone on board American merchant vessels can only be determined by examination of the decisions of the Federal Courts of the United States, the purport of which decisions it would be difficult to state briefly, as the principles laid down therein were applied to varying facts. However the decisions of the Federal Courts seem clearly to support the general proposition that * * *."

7 See the dissenting opinion of Circuit Judge Frank: "The Navy (as distinguished from my colleagues) freely concedes that 34 U. S. C. A. Sec. 591 has nothing to do with the case" (R. 256).

an order or command must amount to "a positive mandate." Winthrop, Military Law and Precedents (1920 ed.), page 574. It is essential that the recipient of a military order or command may determine from its form whether obedience is required. We submit that the two sentences in question are not an "instruction", but, as the dissenting judge stated, "a mere digest of earlier naval court martial decisions * * *" (R. 263). Moreover an "instruction" is not a "regulation", because it is not in "mandatory form".[8] Winthrop, *op. cit. supra, ibid.*

III

The construction of petitioner's contract of reenlistment by the court below is unrealistic and is inconsistent with a decision of the Circuit Court of Appeals for the Eighth Circuit.

Having determined that the last two sentences of Section 334(a) Naval Courts and Boards (1937 ed.) constituted a "regulation", the majority of the court below then held that they were incorporated by reference in petitioner's contract of reenlistment as part of the "regulations" to which he agreed to be subject under that contract. The court pointed out that all persons in the Naval service "so far as the duties of each are concerned" are directed to observe the provisions of Naval Courts and Boards. See Naval Courts and Boards (1937 ed.), page vi.

Naval Courts and Boards is primarily a manual for the use of Naval courts-martial, courts of inquiry, and boards of investigation. It has never been circulated gen-

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8. For purposes of Section 591 of Title 34, U. S. C., the court below did not have to conclude that an "instruction" is a "regulation" since that Section covers both.

erally in the Naval service. Only a small percentage of Naval officers have duties which require a familiarity with its provisions. Only enlisted men in the yeoman branch attached to courts martial or legal staffs would even see this book. Surely a chief signalman, such as petitioner, would neither see Naval Courts and Boards nor understand its contents if he should see it. To call the provisions of this book a part of the contract of enlistment is to indulge in a fiction without any foundation. This is incorporation by reference beyond the limits of any reason or fairness.

Moreover, the holding of the court below that petitioner consented to the jurisdiction of the Naval court martial is inconsistent with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Ver Mehren* v. *Sirmyer,* 36 F. (2d) 876 (CCA 8th, 1929). In that case it was held that one cannot confer jurisdiction upon a military court by consent. *Cf*: 22 Op. Att'y. Gen. 137 (1898).

IV

The Circuit Court of Appeals has accepted a recent administrative interpretation of the Articles for the Government of the Navy which has not been clearly established and has rejected a long settled and contrary interpretation.

A. *Importance of Question.*

One of the most important questions in this case is the effect to be given to the Navy's administrative interpretations of the AGN. The Circuit Court of Appeals rested its decision on an acceptance of those interpretations. It is a matter of foremost importance for this Court to decide whether the jurisdictional boundaries of military courts

may be extended by administrative interpretations. In the light of our policy "adverse to any unnecessary extension of the authority of military courts" (R. 260), it would seem that administrative decisions on a question of jurisdiction should always be subject to judicial review. In *Rosborough* v. *Rossell*, 150 F. (2d) 809 (CCA 1st, 1945), the Circuit Court of Appeals for the First Circuit rejected certain decisions of the Navy on a question of jurisdiction under the AGN, and determined the matter for itself. But the court below has relied on the Navy's latest interpretation of the statute, and has added little independent reasoning in support of its decision.

B. *The Present Administrative Interpretation of the AGN Has Not Been Clearly Established.*

The present administrative interpretations of the Navy with respect to the effect of reenlistment have been "too desultory and brief to fix the meaning" of the AGN. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 311 (1933). The origins of the present rule are found in a case which arose in the Navy in 1919. C. M. O. 237—1919, page 22. In that case the Navy requested of Attorney General Palmer his opinion concerning its jurisdiction to try a man, who had reenlisted in the Navy, for an offense committed during a prior enlistment. The Attorney General, relying in part on the Army rulings referred to above, held that there was no jurisdiction. However, he suggested that the Navy "assert the jurisdiction in a proper case in order to obtain, if possible, an authoritative judicial determination of the question." 31 Op. Att'y Gen. 521 (1919).

Thereafter, the Navy continued for more than a decade to adhere to its established ruling that reenlistment does not restore the jurisdiction over offenses committed during

a prior enlistment. Laws Relating to the Navy, Ann. (1929 Supp.) page 179 (reporting a case decided in January, 1922); C. M. O. 12—1929, page 7. *Ex parte Joly, supra,* was decided in 1922, but it was not until 1933 that the Navy accepted it as the "authoritative judicial determination" referred to by Attorney-General Palmer. See ft. nt. 30 to Section 559, Naval Courts and Boards (1923 ed.), which added after publication a reference to a 1933 case[9] changing the rule.

The present administrative ruling concerning the effect of reenlistment is difficult to reconcile with related rulings of the Navy. Where a man deserts during an enlistment in the Navy and thereafter reenlists in the Navy and receives a discharge, the Navy has ruled that he cannot be tried for desertion committed during the prior enlistment.[10] C. M. O. 3—1946, page 79; C. M. O. 7—1946, page 247; C. M. O. 2—1947, page 36. To the same effect see: *Gould v. Drainer, supra.* Since expiration of an enlistment is not effective until there is a discharge (Naval Courts and Boards (1937 ed.), Section 334; *Ex parte Wilson, supra*), it would seem that such a deserter would remain in the Navy and amenable to court martial under the terms of his first enlistment. He would continue to be a "person in the naval service" (34 U. S. C. Sec. 1200, Article 8) to the same extent as petitioner, and his discharge from the

9 G. C. M. Rec. No. 75740 dated February 1, 1933.

10 The Army rule again differs from the Navy rule and from the decision in *Gould v. Drainer, supra.* In the Army an honorable discharge terminates the particular term of enlistment to which it relates and does not relieve a soldier from the consequences of a desertion committed during a prior enlistment. However, a dishonorable discharge does not relate to any particular enlistment and does relieve the soldier from such consequences. Dig. Op. JAG (1867-1912) page 515, par. VIII, 1 1c.

Naval service under the second enlistment would not terminate the Navy's jurisdiction over him under the decision of the court below. Accordingly, the administrative rulings on these related cases are inconsistent, just as the decision of the Circuit Court of Appeals in the case at bar is inconsistent with *Gould* v. *Drainer*, *supra*.

In view of its evolution and apparent conflict with related rulings, the present administrative Naval ruling is neither clearly established nor consistent. Therefore, it should not be given the same weight as is normally accorded to unambiguous rulings of "those who must constantly deal with the statute and whose understanding of it is likely to be right in cases of doubt" (R. 255). This Court should now make the "authoritative judicial determination" that Attorney General Palmer deemed appropriate.

C. *The Navy was Bound by its Settled Administrative Interpretation.*

For many years prior to 1933 the Navy had consistently ruled that reenlistment did not revive its jurisdiction over offenses in a prior enlistment. Thereafter, as we have shown, the Navy has held that reenlistment does revive its jurisdiction.

In these circumstances the earlier interpretations of the AGN were written into the statute and could not be changed by subsequent administrative interpretations. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294 (1933); *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 (1941). Despite the able and vigorous opinion of the dissenting judge, the Circuit Court of Appeals completely disregarded the decisions of this Court and acquiesced in the new interpretation adopted by the Navy. The court below glossed over the problem with the statement

that "the Navy has had two interpretations and their later one seem to us permissible and preferable" (R. 256). But the second interpretation was made in the face of a long standing administration of the law under the first interpretation and was thus invalid. The rule of the *Bunte* case should be followed, as the dissenting judge pointed out (R. 260), where personal liberty is at stake and the jurisdiction of a military tribunal is in question. Otherwise there is grave danger that the arbitrary action of administrative officials may become an instrument of oppression.

V

The decision of the Circuit Court of Appeals concerning the effect of an honorable discharge is inconsistent with decisions of this Court and of another Circuit Court of Appeals and should be reviewed by this Court.

As we have stated above, the question whether petitioner's reenlistment revived the Navy's jurisdiction is not affected by the kind of discharge which petitioner received at the end of his prior enlistment. But petitioner received an honorable discharge. The court below stated that an honorable discharge does not operate as a "pardon" (R. 255). No question of a "pardon" is involved since petitioner had not been convicted of any offense at the time of his discharge. But a discharge with honor has been held by this Court to constitute "a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor." *United States* v. *Kelly*, 82 U. S. 34 (1872).

The decision of the court below concerning the effect of an honorable discharge is inconsistent with *Ex parte*

Drainer, supra. In the *Drainer* case it was held that an honorable discharge at the termination of a second enlistment in the Navy gave immunity from prosecution for desertion during a prior enlistment. The District Court based its decision on the ground that the honorable discharge from the second enlistment constituted a final accounting with respect to the military service that had terminated. In affirming without an opinion the Circuit Court of Appeals for the Ninth Circuit rendered a decision which, on this point, is inconsistent with the decision of the court below.

To millions of veterans the effect of an honorable discharge is a question of the gravest importance. Under the decision of the court below these veterans might well be subject to trial for offenses committed during the war if they should reenlist or be drafted into the service again.[11] They might not even be protected by the Statute of Limitations. For under the court's reasoning they might be regarded as being not amenable to Naval justice between their periods of service and the Statute of Limitations might therefore be tolled.[12] Before such a rule becomes the

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11 Under the Selective Service Act of 1948 persons who have served honorably on active duty for at least 12 months between September 16, 1940, and June 24, 1948, or more than 90 days between December 7, 1941, and September 2, 1945, may not be inducted under the Act; others who have not so served may be inducted. Public Law 759—80th Congress, ch. 625—2d Session.

12 The second majority opinion, adopting the suggestion of respondent's counsel, found this case analogous to "that of a defendant who commits a crime in Canada, escapes to the United States, and then returns to Canada" and is, of course, subject to prosecution. Such a person is a fugitive from justice and might well be subject to extradition from the United States. Although this analogy seems clearly inapplicable, if it were applied to this case the Statute of Limitations would be tolled during the period that petitioner was a civilian. See: *In re Davidson*, 4 Fed. 507 (S. D. N. Y., 1880); *Ex parte Clark*, 274 Fed. 533 (S. D. N. Y. 1921).

law of this country the voice of this Honorable Court should be heard.

CONCLUSION

The Circuit Court of Appeals for the Second Circuit has decided a question relating to the jurisdiction of Naval courts martial which has not been, but should be, settled by this Court. In an area of law where certainty is of the greatest importance, the administrative rulings of the Navy and the Army and decisions of the lower Federal courts are in a state of confusion. This confusion has been aggravated by the decision of the Circuit Court of Appeals. Wherefore, petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review its judgment in this case.

Respectfully submitted,

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